

Ombudsman's Determination

Applicant	Mrs S
Scheme	Principality Pension Scheme SSAS (the Scheme)
Respondents	James Hay Partnership (James Hay) Mr Stephen Dunlop, Mrs Helen Dunlop, Mr Gary Dunlop and Mrs Glenna Dunlop (the Member Trustees)

Complaint Summary

Mrs S's complaint against James Hay and the Member Trustees, is about the delay in paying her the benefits she is entitled to under the Scheme following the death of her late husband.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against James Hay and Mrs Glenna Dunlop, but it should be upheld against Mr Stephen Dunlop, Mrs Helen Dunlop and Mr Gary Dunlop because:

- James Hay had urged the Member Trustees to settle Mrs S's husband's death benefits;
- there is no evidence to show that Mrs Glenna Dunlop was responsible for any delay; and
- there is evidence to show that Stephen Dunlop, Helen Dunlop and Gary Dunlop are responsible for the delay and there is no evidence to show what action, if any, they have taken, or are taking, to settle the matter.

Detailed Determination

Material facts

1. Rule 4.1.12 of the Definitive Trust Deed and Rules, dated 17 June 1980, for the Scheme states:

“In the event of the death in service of a member or a deferred member any lump sum in respect of him will be paid or applied within 2 years of the date of his death to or for the benefit of such one or more of the following and in such proportions as the Trustees shall in their discretion determine:-

 - (a) his spouse
 - (b) his children
 - ...
2. A Deed of Amendment for the Scheme was executed on 28 July 2006, to reflect the changes that came into force as a result of the Finance Act 2004.
3. Mr S, Mrs S's husband, was a member of the Scheme, a Small Self Administered Scheme, and retired in July 2006. In July 2006 he was provided with an illustration of the benefits by IPS (who now trade under the name of James Hay) confirming that the benefits payable to him from the Scheme were a pension commencing lump sum of £250,000 and a pension of up to £49,500 per annum. Mr S took the maximum pension commencing lump sum and income of £49,500 (gross) in October 2006, October 2007, October 2008, August 2009 and August 2010, thus crystallising his pension benefits.
4. Mr S sadly died on 12 November 2012.
5. In January 2013, Leo Abse & Cohen, the solicitors acting for Mr S's estate, wrote to James Hay enquiring about death benefits under the Scheme in respect of Mr S.
6. In April 2013, in an email to Mr Stephen Dunlop, James Hay said that it had located extensive documentation relating to the “purchases made by the Trustees of the Scheme”, and stated that the death benefits discussed at the last meeting needed to be dealt with.
7. On 24 May 2013, in response to enquiries raised, in an email to Mr Stephen Dunlop, James Hay said:

“We have now completed a detailed review of the documentation we hold for the Scheme. This has taken some time owing to the transaction having taken place many years ago, the volume of work being carried out on the Scheme at the time (i.e. the company going into liquidation and subsequent legal action etc) and that Roy would have maintained a comprehensive folder of the SSAS investments.

We cannot trace any documentation on file relating to the initial loan of £785,000 made to Tendall FZCO. As is evidenced by the documentation provided previously the individual Trustees (in the main part Roy judging from your comments at our meeting) had extensive correspondence and numerous transactions with Tendall FZCO. We would therefore expect that the Individual Trustees would have a record of the loan given that extensive negotiations must have taken place between the Individual Trustees and Tendall FZCO to agree the terms of the refinancing deal approved by the Trustees (by way of share transfer). Additionally this agreement settled the loan in full through the issue of shares, the certificates will have been sent to Principality Pension Trust...(the address listed on the Notice of Formal Acceptance).

You have also enquired about the security for the loan and as stated above we have no record of the initial loan going out other than it being mentioned on the refinancing agreement. We would however point out that third party loans do not require security, below is a link to the Pension Scheme's manual and you will see that under the section titled security it expressly mentions security in relation to loans made to the sponsoring employer only.

...

On the subject of pension payments we can confirm that 3 members are currently drawing a pension from the Scheme however the Pension Years do not coincide. The members themselves would need to agree to any change in the payment basis but clearly this could be something discussed at the meeting or agreed between the Member Trustees at the time.

Briefly, the details are:-

- Glenna – Pension Year from 27th July each year, Limit £47,761.34, Payment Frequency: Annual (date varies)
- Your Pension – Pension Year from 27th July each year, Limit £72,592.21, Payment Frequency: Annual in August
- Gary – Pension Year from 2nd March each year, Limit £26,730 (only drawing £24,420) Payment Frequency: monthly.

...

As mentioned in your email the Trustees should begin looking at the Death Benefits which will need to be settled from the Scheme following [Mr S's] death as soon as possible. My colleague ... is due to be working on the case on behalf of Union Pension Trustees Limited, the Corporate Trustee, but many of the key decisions (such as providing sufficient liquidity to pay benefits and agreeing on the beneficiaries) will need to be considered by the remaining Trustees."

8. In May 2013, James Hay wrote to Leo Abse & Cohen explaining that Mr S's benefits were held in trust and would not form part of his estate. James Hay said that the benefits were payable at the discretion of the trustees, and the Member Trustees were still considering who the benefits should be paid to.
9. In August 2013, James Hay emailed Mr Stephen Dunlop, saying that it could not provide him with the documentation he had requested. It stated that the trustees of the Scheme needed to look to calculate the death benefits payable following Mr S's death.
10. On 15 October 2014, Mrs S telephoned James Hay about her late husband's death benefits and the ongoing dispute. James Hay say that they have no notes on their file about when she called, with whom she discussed this matter and about the outcome. In addition, there were no notes about who called her back, when or what was discussed.
11. In May 2016, Mrs S complained to both James Hay and the Member Trustees that she had received no payment from the Scheme in respect of her late husband's pension benefits.
12. In May 2016, Carbon Law Partners, the solicitors acting for the Member Trustees, responded to Mrs S saying:

"I can confirm that I am instructed on behalf of the Trust and have been passed a copy of your recent email to Stephen Dunlop.

I am instructed that no payments have been made to any beneficiary under the Trust since 2011 save for a payment to Glenna Dunlop in 2013 (this payment was not authorised by the member trustees) and monthly payments to Gary Dunlop which ceased in or around August 2012. These were his instalments for the annual payments of pension given to the other beneficiaries in the previous year.

The Trust is unlikely to be in a position to make any pension payments in the foreseeable future and in fact I am instructed to confirm that at this time it is at risk of facing a deficit.

The current balance of the fund is minimal. Principality House is vacant therefore; no income is being derived from a tenant and to be in a position to market the property at a market rent the property is in need to extensive refurbishment which has been estimated at a cost in excess of £1M which the Trust simply cannot afford at this time. In addition, the property is subject to proceedings by the local authority for non-payment of business rates over a number of years which the Trustees are currently in the process of defending and Mole Valley, formally trading as Scatt, have also served notice to effect the break clause within their Lease and are therefore due to leave in October meaning the income from their rent will cease causing further difficulty. With all

of that in mind I am sure you will appreciate that your comments in relation to payments being made are certainly not accurate.

In addition to the above, the Trustees of the fund have been in discussions with Glenna Dunlop for a period of 2 years in relation to her, at best negligence and at worst fraudulent activity alongside Roy Dunlop [Stephen Dunlop's father]. This matter has only recently been compromised by way of mediation. The result of which being that she has been forced to relinquish her interest and any share in the Trust.

Part of our instructions, relate to your late husband's involvement in the Trust and we would like to suggest a meeting with you to discussed these matters and hopefully to find a suitable way forward for all concerned.

I would be grateful therefore if you would let me have confirmation of whether you would be willing to attend a meeting to discuss this in more detail?"

13. Mrs S informs us that she did not agree to attend a meeting with Mr Stephen Dunlop due to his aggressive nature and her heart condition.
14. On 27 July 2016, the Member Trustees, excluding Mrs Glenna Dunlop, wrote to James Hay saying:
 - a. whilst they were fully aware of their duties and obligations, they had discovered extremely serious issues following the deaths of Mr Roy Dunlop and Mr S concerning the improper (potentially unlawful) investment of a major part of the liquid assets of the fund which have severely depleted the assets;
 - b. litigation was under consideration and Mrs S was fully aware of the position;
 - c. they were surprised that James Hay were encouraging any measure of distribution when the Scheme owed Santander PLC close to £700,000 – their priority was to reduce the debt before they could contemplate turning their attention to the financial aspirations of the members of the Scheme;
 - d. consequently, they refuse any distribution of benefits unless and until the above matters were resolved to their satisfaction.
15. As Mrs S was unable to resolve her complaint she brought it to us.
16. On 4 November 2016, in response to Mrs S's complaint, James Hay told her:

"...James Hay was appointed both a Trustee and Practitioner of the scheme. There are other Trustees and Members of this pension scheme besides James Hay and your late husband, all of whom are the appointed scheme administrators...The allocation of any pension benefits to a surviving relative must be agreed unanimously by all the Trustees of the pension fund. Once this has been agreed and documented, a valuation of the member's share can then be calculated and options would then be supplied (to the nominated and

appointed surviving relative) outlining how benefits from the pension plan may be taken.

As I am sure you are well aware, to date no such agreement (about who should benefit from your late husband's share in the pension fund) has been reached. The agreement must be unanimously made by all Trustees and there is no provision within the Trust Deeds and subsequent Trustee Resolutions to circumvent this position under any circumstances. We accept that this position is not acceptable but [we] cannot resolve that matter in isolation of the other Trustees of the scheme.

I note that all of the Trustees of the Scheme, including James Hay, were formally notified of your late husband's passing at a Trustee Meeting in December 2012. A Senior Manager from our Pension Administration Department attended that meeting and took time to explain to the rest of the Trustees attending the meeting about the process to be adopted by the remaining Trustees of the scheme in allocating the deceased member's pension benefits available from the plan, alongside the responsibility of each Trustee in this regard. The Trustees should then have agreed between themselves who should benefit from your late husband's proportion of the pension fund, and then proceeded to notify James Hay of the decision in writing. This unfortunately never happened..."

17. On 5 January 2017, James Hay wrote to Mrs S informing her that the Trustees had unanimously agreed that she was a beneficiary of her husband's fund share under the Scheme. It said:
 - a. The next step was for her to choose how she would like to receive her death benefits.
 - b. The death benefits could be paid as a lump sum, a dependant's pension or via an annuity, or any combination and proportion as she chooses. If she chooses a dependent's pension, this could be under a flexi-access drawdown or by way of purchasing an annuity using the fund. Her confirmation of the chosen option will be required prior to payment of any death benefits.
 - c. The lump sum would normally be outside Mr S's estate for assessment of inheritance tax, however any lump sum payment would be subject to income tax at her marginal rate.
 - d. If she chooses a dependent's pension, she will need to become a member and a trustee of the Scheme.
 - e. Once her choice is made and its requirements satisfied, the payment of the death benefits will still be subject to the calculation of Mr S's fund within the Scheme, and therefore to the Trustees providing valuations for all the Scheme's assets.

- f. The Trustees have indicated that the valuations are not readily available because: there are insufficient liquid funds held in the Scheme to arrange red book valuations for the properties held as assets of the Scheme; Mrs S's claim can be legitimately refused at the present time on the basis that: (a) the cash position of the trust is such that it cannot pay a pension, (b) the trust assets are charged to Santander and (c) further costs are likely to be incurred in prosecuting the claims against those responsible for the Scheme losses; and Mrs S's right to benefits under the Scheme should be impounded pending further investigation.
18. On 6 February 2017, in response to our further enquiries the Member Trustees said:
- a. at no time since the death of Mr S have they denied the entitlement of Mrs S to be recognised as a beneficiary under the Scheme; and
 - b. their issue is the payment of Mrs S's benefits, and like all the other beneficiaries, she must await her benefits until the full extent of the damage to the fund has been established and those responsible brought to account.

Summary of Mrs S's position

19. When her husband's will was finalised in December 2013, she was informed by Leo Absey that the pension monies were outstanding.
20. She rang James Hay in March 2014 and was informed: "frustratingly a meeting had yet to take place with the trustees due to family disagreements". She continued to phone every six months and was given the same response.
21. In June 2015 as the matter had not been resolved, she rang James Hay and spoke to the person she had spoken to in March 2014. She was told that the only solution was for James Hay to refer the matter to the Pensions Ombudsman.
22. When she rang James Hay in April 2016, she was told that the person who she had spoken to had now left service and her case had not been referred to the Pensions Ombudsman.
23. She had never indicated to James Hay or anyone else an unwillingness to become a member or a trustee of the Scheme.

Summary of James Hay's position

24. In December 2012 at the first quasi Trustees meeting following Mr S's death, the attendance note shows that Mr G, one of its employees, explained the death benefit process and its requirements to Mr Stephen Dunlop. It reasonably expected Mr Stephen Dunlop to share all communications and correspondence with his fellow Member Trustees, co-ordinate a view about the allocation of benefits and communicate this to James Hay. However, the Member Trustees did nothing for nearly four years.

25. In April, May and August 2013, it sent emails to Mr Stephen Dunlop requesting that a Trustees meeting be reconvened to address the issue of death benefits and, in particular, settle the matter regarding the death benefits for Mr S. It also threatened to withhold the provision of previously requested Scheme documentation until the Member Trustees made a decision about Mr S's death benefits. The Member Trustees ignored its request and did nothing for nearly four years.
26. In December 2014, it issued a letter to Mr Stephen Dunlop offering to meet and discuss any concerns, and specifically the matter about Mr S's outstanding death benefit. However, this request was ignored by the Member Trustees.
27. Following receipt of Mrs S's complaint in July 2016, it issued a letter to every Member Trustee requesting that a decision be made in respect of Mr S's death benefit. The three same Member Trustees responded in writing making it clear that they jointly were not concerned about any beneficiary entitlement from the Scheme at that moment in time.
28. Recent communications received from the three Member Trustees, have served to demonstrate a continued unwillingness on the part of the majority of the Member Trustees to provide it with a current valuation of the Scheme assets or with any authority to make a distribution of benefits to Mrs S.
29. The extent of available liquid cash assets held within the Scheme and the current inability of the Trustees to agree any unanimous action, should not be used as an excuse by the Member Trustees to avoid their responsibility to provide it with a valuation of the Scheme assets and progress the provision of benefits for Mrs S.
30. Mrs S has previously indicated an unwillingness to become a member or a trustee of the Scheme and so a payment from the Scheme is a likely outcome. At present, it is unclear whether this could be accommodated through the available liquid funds. Its understanding, and this will become apparent upon receipt of a full valuation of the Scheme, is that a majority of the investments are currently locked into commercial property which may need to be sold. This will take time and consideration may need to be given to a forced sale at auction given that the Member Trustees might otherwise find it difficult to agree a sale price, buyer and agent to facilitate this.
31. The valuations provided to it by the Member Trustees are not adequate for purpose.

Summary of Member Trustees' position

32. The response was from three of the active trustees and did not include Mrs Glenna Dunlop, who was in the process of leaving the Scheme by agreement.
33. No Member Trustee has taken a pension from the Scheme for many years because of the damage to the fund, where the principle asset now comprises a property.
34. All pension payments were stopped after Mr Roy Dunlop's death in October 2012, when the losses and conduct of others came to light.

35. The last beneficiary of a pension was Mrs Glenna Dunlop in February 2013 and a small number of payments were made to Mr Gary Dunlop via a standing order until early 2013.
36. The Scheme had secured borrowings with Santander of nearly £1,000,000.
37. They had taken counsel's opinion on the matters to date, and have been advised that the trust deed which governs the Scheme states that the payment of benefits are discretionary.
38. They have also been advised that Mrs S's claim for a pension can be refused because the cash position of the Scheme is such that they cannot pay her one, the assets are charged to Santander and further costs are likely to be incurred in prosecuting those responsible for the losses incurred by the Scheme.
39. Mrs S cannot benefit from the fruits of the unlawful action of her late husband. The benefits that may be due to Mrs S (and others) should be impounded pending further investigations into the conduct of those responsible for the losses and the action necessary to remedy the situation.
40. James Hay were not frustrated by the member trustees; rather James Hay had determinedly refused to meet with them since 2014, have acted towards them in a dismissive manner, are refusing without good cause to supply documents to solicitors in connection with a claim against them and are being replaced as professional trustees.
41. They have never denied that Mrs S is a beneficiary under the scheme.
42. Valuations were supplied to James Hay on 10 June 2017. If they need something different they will have to authorise the scheme to pay for further valuations.
43. It is perverse to penalise three of the Member Trustees with a penalty of £1,000 and inexplicable to exclude James Hay from such a penalty.

Summary of Mrs Glenna Dunlop's position

44. She was not aware of Mrs S's complaint until March 2017;
45. She is a member and trustee of the Scheme.
46. As a trustee of the Scheme she should have been consulted about matters affecting the viability of the Scheme, but she does not appear to have been consulted on several matters and dealings for a few years.
47. She is of the opinion that investments on behalf of herself and her late husband, Mr Roy Dunlop, were approved and the documents were signed by her fellow Trustees.
48. She has no knowledge about the valuation of the assets of the Scheme or the sale of the property which is an asset of the Scheme.

49. She fully accepts that Mrs S should be a beneficiary under the Scheme and be invited to be a trustee of the Scheme.

Conclusions

50. As a member of the Scheme, Mr S would have been entitled to a share of fund which would have been expressed as a percentage of the total assets at the time he retired. The cash lump sum he took on his retirement and the instalments of the pensions he received would have been paid from his share of the fund. When he died, the trustees of the Scheme would have to decide to whom of his beneficiaries his remaining share of the fund should be paid as death benefits.
51. Under the rules of the Scheme, on the death of a member, or deferred member, any lump sum must be paid or applied within two years of the member's death. Mr S died on 12 November 2012 and therefore his remaining share of the fund should have been paid to his beneficiaries before 11 November 2014. The failure by the trustees of the Scheme to make a decision about entitlement to the lump sum and make payment within two years of Mr S's death is a breach of trust and therefore maladministration.
52. I can see from the evidence that, since early 2013, James Hay had been urging the Member Trustees to settle the benefits due on Mr S's death. I have considered the argument that James Hay refused to meet the member trustees since 2014, but no case has been put forward about why such a meeting was needed. I can see nothing to suggest that the delay in consideration of payment of Mr S's death benefit was due to James Hay. Therefore I do not uphold the complaint against it. I make no finding about other allegations levelled at James Hay by the member trustees which appear to me to be outside the scope of the complaint accepted for investigation.
53. Mrs Glenna Dunlop says that she was not aware of Mrs S's complaint until March 2017. She also says that she was not consulted about the viability of the Scheme and has been excluded from several matters and dealings in relation to the Scheme for a few years. In its letter in May 2016 to Mrs S, Carbon Law Partners states that Mrs Glenna Dunlop "has been forced to relinquish her interest and any share in the Trust". I note that the member trustees have objected to the use of the word 'forced' in this context. I make no finding about the circumstances of her relinquishing her interest and share. Sufficient for these purposes to say that there is no evidence to show that she had any involvement in the delay in the settlement of Mr S's death benefits. Consequently, I do not uphold the complaint against her.
54. Turning to the remaining three Member Trustees (i.e. Mr Stephen Dunlop, Mrs Helen Dunlop and Mr Gary Dunlop), it is clear from the evidence that they are responsible for the delay in the settlement of Mr S's death benefits. It was not until February 2017, in response to our further enquiries, that they said they did not deny that Mrs S had an entitlement to be recognised as a beneficiary. However, they added that their issue was paying her a benefit from the Scheme. The reasons they gave for the delay

in paying Mrs S a benefit was because there were issues with regard to the Scheme's investment; a property which is the sole asset of the Scheme is currently subject to proceedings by the local authority for non-payment of business rates and there is no rental income on the property.

55. While I do not doubt that there may be issues which may have caused a delay in the settlement of Mr S's death benefit, I can see little or no evidence of the action taken by the Member Trustees, excluding Mrs Glenna Dunlop, to try to resolve them.. Specifically, I have seen no evidence that the Trustees have valued the benefit due to Mrs S and no evidence that they have made a formal decision whether Mrs S is or is not immediately entitled to that value. That question is separate and distinct from the issue of whether funds are available to pay any benefit which may be due and how the Trustees address any liquidity problems which the scheme may have. I am satisfied that the responsibility for the delay in taking these decisions lies with Mr Stephen Dunlop, Mrs Helen Dunlop and Mr Gary Dunlop. As a consequence of the delay, I find it likely that Mrs S has suffered significant distress and inconvenience. I therefore uphold the complaint against Mr Stephen Dunlop, Helen Dunlop and Gary Dunlop and make the directions below in an effort to remedy the injustice. About those directions, James Hay have observed that the usual order of events is that Mrs S should indicate her preferred method for taking any benefit due to her and Trustees would then obtain the necessary valuations . If an immediate payment from the scheme is required that is likely to take some time and may require a forced sale of illiquid scheme assets to achieve, by which I understand them to be saying that the actual grant of benefit may take some time.
56. For their part, the member trustees have asserted that a grant of benefit is inappropriate in any event, because any such benefits are the fruits of unlawful actions. I have seen no evidence that the Trustees have ever made a formal decision to withhold a benefit on that basis and I make no finding about whether such an approach would be sustainable.
57. Because matters have become so protracted an issue has arisen about whether it is appropriate to use current or historic property values. The member trustees point out that scheme costs will be further depleted if updated valuations are required. James Hay have indicated that they are content to base calculations on historic valuations of the commercial property previously provided by the Member Trustees and I consider that approach reasonable given the delay which has occurred. No agreement has yet been reached about the basis of calculation of the unlisted shares and the direction below is intended to remedy that. James Hay have suggested a valuation based upon evidence provided by the companies themselves and I agree that that approach appears reasonable.
58. James Hay have also invited me to make detailed directions to deal with the likely future consequences of Mrs S making an election about payment of her benefits, including the possible need to sell the property to produce sufficient liquid assets. I have considered those requests for further directions. However, I consider that it

would be wrong of me to pre-empt the Trustee decision about how much is immediately due to Mrs S or the decisions that Mrs S still has to make about her options. The directions below are intended to ensure that the Trustees make a formal decision about what they consider is due to Mrs S, that she is notified of that decision, can make the choices which are available to her and may then take such further steps as may be necessary to secure payment of benefit in the form which she elects to take it.

Directions

59. I direct that:

- a. To the extent that they have not already done so, within 28 days of this determination, the Member Trustees will provide James Hay with their proposal for the valuation of the Scheme's assets as at the date of Mr S's death, and in particular the unlisted shares, so that James Hay can calculate Mr S's share of the fund;
- b. within 28 days of James Hay producing a calculation of Mr S's share of the fund, the Trustees shall make a unanimous decision about Mrs S's entitlement to benefit under the Scheme rules, setting out their reasons, so that James Hay can notify her of it.
- c. within three months of Mrs S providing the trustees of the Scheme (i.e. James Hay and the Member Trustees) with her decision of how she wishes to take her benefits, she will be paid the benefits due plus interest.

60. The interest described above is the base rate for the time being quoted by the reference bank. I recognise that even if the funds had been available, it would have taken the Member Trustees and James Hay a bit of time to formally agree to whom the death benefits should be paid. Therefore, the interest should be calculated from 12 February 2013 (three months after Mr S's death) to the date payment is made.

61. Within 28 days Mr Stephen Dunlop, Mrs Helen Dunlop and Mr Gary Dunlop will pay Mrs S the total of £1,000 for the significant non-financial injustice she has suffered and shall not be entitled to recover any portion of that money from Mr S's share of the fund.

Karen Johnston

Deputy Pensions Ombudsman
27 September 2017